PD-1090&1091-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/28/2019 2:11 PM
Accepted 3/28/2019 2:16 PM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
3/28/2019
DEANA WILLIAMSON, CLERK

**PD-1090-18 & PD-1091-18**
In the Court of Criminal Appeals of Texas
At Austin

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**Nos. 14-15-01005-CR & 14-15-01006-CR**
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

**Nos. 1374837 & 1374838**
In the 177th District Court
Of Harris County, Texas

———♦———

**Nathan Ray Foreman**
*Appellant*

*v.*

**The State of Texas**
*Appellee*

———♦———

# State's Brief on the Merits

———♦———

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**Leslie Yates, Jay W. Burnett, Ryan J. Patrick, and Jim Anderson**, presiding judges

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## Statement of the Case

The appellant was indicted for aggravated robbery and aggravated kidnapping. (1 CR 17; 2 CR 15).[1] The indictments contained an enhancement paragraph alleging that the appellant had a prior felony conviction. (1 CR 17; 2 CR 15). The appellant pleaded not guilty, but a jury found him guilty as charged. (3 RR 27-28; 1 CR 242; 2 CR 256). The appellant pleaded "true" to the enhancements and the trial court assessed punishment at 50 years' confinement for each case, to run concurrently. (1 CR 243; 2 CR 243). The trial court certified the appellant's right of appeal, and the appellant filed a timely notice of appeal for both cases. (1 CR 246, 247; 2 CR 260).

On August 10, 2017, a divided panel of the Fourteenth Court affirmed the trial court, with one justice concurring and one justice dissenting. The appellant filed a motion for *en banc* reconsideration, which was granted. On August 31, 2018, The *en banc* Fourteenth Court issued a published opinion reversing the trial court. *Foreman v. State*, 561 S.W.3d 218 (Tex. App.—Houston [14th Dist.] 2018, pet.

[1] For ease of citation, the State will refer to the clerk's records in these cases as though they were sequential volumes. Thus the record for cause 1374837 will be 1 CR, and the record for cause 1374838 will be 2 CR. For documents that are in both volumes, the State will cite to 1 CR.

granted). Two justices dissented. *Id.* at 245-253 (ops. of Jamison, J., and Donovan, J., dissenting).

## Grounds for Review

**1. The Fourteenth Court erred by holding that a magistrate could not infer from the warrant affidavit that an auto body shop would have a surveillance system. The Fourteenth Court held that before a magistrate could consider common knowledge, the matter must be "beyond dispute," a civil standard the Fourteenth Court grafted onto Fourth Amendment law.**

**2. The Fourteenth Court erred by holding that when officers see a surveillance system recording a location where a crime occurred two weeks prior, they do not have probable cause to seize the system's hard drive unless they know what is on the hard drive prior to examining it.**

**3. The Fourteenth Court erred by holding that the error required reversal, even under the standard for non-constitutional error, where the State's remaining evidence was overwhelming and the defense non-existent.**

## Statement of Facts

Though the facts here are only marginally relevant to the appellant's issue on appeal, they are extraordinary.

Richard Merchant is a Liberian national who visited Houston in late 2012. (4 RR 134-35). Merchant went to the drug store to buy some toothpaste, and when he came out he saw a friendly man in a

BMW. (4 RR 138). Believing that a man in a flashy car must have money, Merchant decided to run a scam on him. (4 RR 138-42).

Specifically, Merchant decided to run a "Black Money" scam. In a black money scam, the scammer will tell the mark that he has illicitly gained American currency that he smuggled into the country by dying it black. The scammer will tell the mark he knows what chemicals it will take to remove the dye, but doing so requires money and time that the scammer does not have, so he will sell the mark the black money at a discounted rate. The scammer will then give the mark something that resembles black American currency, and then make off with the mark's money. (*See* 3 RR 155-56; 4 RR 147-51, 154-59).[2]

Merchant approached the man in the BMW with a $20 bill and told the man he made that bill and he could make more. (4 RR 138-42). The man in the BMW—"Junior"—asked Merchant to meet him at Dreams Auto Customs, an auto shop owned by the appellant's wife. (4 RR 142-43). There, he met Junior's father, the appellant. (4 RR 144-145).

The appellant took his friend Moses Glekiah to meet the appellant for the next phase of the scam. (4 RR 146). Merchant

[2] *See also* "Black money scam," Wikipedia, https://en.wikipedia.org/wiki/Black_money_scam.

brought $1000 of real money that had been dyed black; he took $2000 from the appellant, ran the black money through some chemicals to remove the dye, and then gave the appellant $3000 as a demonstration. (4 RR 146). The appellant bought the scam. (4 RR 153). The appellant agreed to pay $100,000 to Merchant and Glekiah for $200,000 in black money and the chemicals to clean it. (4 RR 153).

Merchant and Glekiah showed up at the appellant's auto body shop on Christmas Eve, 2012, with a suitcase full of black construction paper that was cut and wrapped into bundles. (4 RR 153, 158; *see* State's Ex. 82). The plan was that Merchant and Glekiah would take the $100,000 from the appellant. They would then take the "black money" and some noxious chemicals into the bathroom. Because the chemicals smelled strongly of ammonia, they believed no one would follow them into the bathroom. They would then intersperse some of the appellant's cash among the bundles of construction paper to make it look like there was money in the pile. Then they would leave the construction paper bundles in the chemicals, tell the appellant that the money would take twelve hours to get clean, and leave with the rest of the appellant's cash. (4 RR 157-58).

The plan went awry almost from the beginning. As Merchant and Glekiah were preparing the chemicals, another, unknown man came into the garage. (4 RR 159-60). This upset Merchant because their plan involved being alone with the appellant and Junior. (4 RR 160). When Merchant asked who the man was, the appellant said, "Junior, y'all come get them," at which point several men with guns came into the room. (4 RR 160-61; 5 RR 135, 141).

The gunmen made Merchant and Glekiah get on the ground. (4 RR 160). The gunmen bound Merchant and Glekiah's hands and feet, and put duct tape over their eyes. (4 RR 164; 5 RR 146). For several hours the gunmen and the appellant tortured the two of them, trying to uncover where the scammers kept the rest of their cash. The appellant's men stepped on Merchant's head (4 RR 161, 164), pistol-whipped Merchant (4 RR 161-63), and beat and kicked Glekiah (5 RR 146-47). At one point Glekiah passed out from the beating, so the gunmen woke him up by dousing him with gasoline. (4 RR 165; 5 RR 147-49). After that, the appellant took out a lighter, lit it, and threatened to set Glekiah aflame if he did not tell the appellant where he and Merchant kept their money. (5 RR 153).

Another of the appellant's underlings came out of the office with a clothes iron. (5 RR 164). He plugged in the iron near where Merchant and Glekiah were, and when it was hot he pressed it to Merchant's side. (4 RR 171-72; 5 RR 166; *see* State's Ex. 112).

Sometime after that, the appellant told his underlings to put Merchant and Glekiah in a van and "take them to the spot." (4 RR 172; 5 RR 170). A couple of gunmen backed a van into the auto shop, laid a tarp down in the back, tossed Merchant and Glekiah in, and drove off. (State's Ex. 28, Video 7).

As the van was driving on the US 290 service road in Houston, Glekiah squirmed loose from his bindings. (5 RR 174). Glekiah confronted the gunman sitting in the back of the van: "Why do you want to kill me?" (5 RR 174). The gunman told Glekiah to sit down, but Glekiah opened the back of the van. (5 RR 174). As Glekiah jumped out, one of the gunmen shot him. (5 RR 175). Merchant managed to get his bindings loose; when he tried to stand up, he fell out of the back of the van. (4 RR 180-81). The gunman managed to shoot Merchant eight times before the van drove away. (4 RR 184).

When Glekiah hit the road, he landed in front of an off-duty Houston Police lieutenant who was driving his family to a Christmas

Eve candlelight service. (3 RR 50-54; 5 RR 176). Merchant landed a short distance away and was aided by another passerby. (3 RR 107-10).

## Procedural Background

The appellant's only point on appeal challenged the trial court's denial of his motion to suppress surveillance video found on a hard drive at his auto body shop. All three grounds for review deal with the Fourteenth Court's holding that the trial court's denial of the motion to suppress was reversible error.

### I. The appellant moved to suppress the video, arguing that both the seizure of the hard drive and the search of the hard drive were illegal. The trial court denied the motion, finding the search warrant was valid.

Glekiah spoke with police while recovering from the gunshot wounds. (1 CR 35-36). He identified the appellant's business, Dreams Auto Customs, as scene of the torture, and he picked the appellant out of a photo lineup as the leader of the gang. Houston Police Officer Dan Arnold obtained a search warrant for Dreams Auto Customs. (1 CR 35-38). The warrant authorized police to seize several items that Glekiah had said were used in the offense (such as an iron, a gas can, and a lighter), as well as "audio/video surveillance video and/or video

equipment." (1 CR 37). Police seized from Dreams Auto Customs, among other things, "3 HARD DRIVES FOR COMPUTER." (1 CR 38).

The appellant moved to suppress the three hard drives because Arnold's affidavit "never mentioned a computer, audio/video surveillance video, and/or video equipment…." (1 CR 31).

At a hearing on the motion, Officer Tyson Hufstedler testified that officers serving the warrant found surveillance equipment in the shop's office. (MTS RR 12-15;[3] State's Ex. 3). Police saw a video monitor with a cable leading from it to "a tower or a computer hard drive." (MTS RR 15). The monitor was showing live surveillance video of the shop, so police seized the hard drive in the belief that it might have archived video relevant to the investigation. The hard drive was taken to a digital forensics lab, which found the archived surveillance footage that later became State's Exhibit 28. (MTS RR 17).

Police also seized two other hard drives that were not on at the time, and which contained nothing of relevance. (MTS RR 17-18).

[3] The record of this hearing is not one of the sequentially numbered volumes of the reporter's record.

Defense counsel argued that both the seizure and the search of the hard drives were illegal. He argued that the seizure was illegal because there were "no facts in the warrant [affidavit] to establish probable cause to seize hard drives or computers." (MTS RR 26). He argued the search was illegal because police needed a second warrant to search the hard drives. (MTS RR 27).

The State replied that "it is not unreasonable for a magistrate or yourself to infer that in a custom auto body shop, such as this, the possibility that there would be an audio video system inside." (MTS RR 28). The State noted that from what police observed it was obvious that the first hard drive seized was being used as part of the surveillance system because it was hooked up to the surveillance system at the time police observed it. (MTS RR 29).

The trial court suppressed the two hard drives that were not connected to the surveillance system, but otherwise denied the motion. (CR 34; MTS RR 30-31). The trial court made written findings, concluding that the warrant was supported by probable cause, that the seizure and search of the hard drive connected to the surveillance system did not exceed the scope of the warrant, but that warrant did not authorize seizure of the other two hard drives. (CR 55-56). The

appellant relitigated this motion in a pretrial "motion for rehearing," which was denied. (CR 98-10, 107-16; MFR RR 1-14).[4]

On the first day of trial, the appellant again relitigated this issue outside the presence of the jury. (3 RR 171). When asked if he had "something new or additional" to argue, defense counsel replied that he wanted to question Arnold about whether he found Glekiah to be credible. (3 RR 174).

Arnold testified police were aware Dreams Auto Customs had exterior surveillance cameras, but the affidavit did not mention this. (3 RR 183). While Arnold was not 100% confident that there would be surveillance equipment inside Dreams Auto Customs, he said it would not be unusual for a business to have an interior surveillance system.[5] (3 RR 189). The trial court admitted the video over objection as State's Exhibit 28. (3 RR 196, 276).

[4] The record of this hearing is also not one of the sequentially numbered volumes of the reporter's record.

[5] In front of the jury, Arnold said a surveillance system was "not unusual" and "probably expected" in a business. (3 RR 204-05).

## II. In the Fourteenth Court:

### A. The appellant challenged the seizure of the hard drive, arguing the affidavit did not provide probable cause to believe there was surveillance equipment at the auto body shop.

The appellant raised a single issue on appeal, arguing the trial court erred in denying his motion to suppress because "[t]he [warrant] affidavit fails to establish probable cause that surveillance video or surveillance equipment would be at the target location." (Appellant's Brief on Original Submission at 13).

The State replied that even though the affidavit did not mention a surveillance system at Dreams Auto Customs, surveillance systems are so ubiquitous in businesses that the likely presence of a surveillance system was common knowledge. (State's Brief on Original Submission at 19-21). Moreover, because of the particular nature of an auto body shop—the owner stores his clients' valuable, moveable possessions—it was more likely that Dreams Auto Customs would have a surveillance system. (*Id.* at 21-22).

After a divided panel affirmed the trial court, (in a trio of now-withdrawn opinions), the appellant moved for *en banc* reconsideration. The *en banc* court held oral argument, after which the State submitted a supplemental brief arguing the seizure could be justified as a lawful

plain-view seizure: Even if the warrant was defective regarding the surveillance system, it was still a valid warrant that allowed the police onto the premises, and once they observed a surveillance system that seemed to be recording the crime scene, they had probable cause to believe the hard drive contained evidence of a crime. (State's Post-Submission Brief at 22-24).

### B. The *en banc* Fourteenth Court held that the warrant was invalid as to the hard drive, and the seizure of the hard drive could not be justified under the plain view doctrine because police did not have probable cause to believe it contained evidence.

A seven-justice majority sided with the appellant. The court held that the warrant was invalid as to the surveillance video because there were no facts in the affidavit showing the presence of a surveillance system. *Foreman v. State*, 561 S.W.3d 218, 234-41 (Tex. App.—Houston [14th Dist.] 2018, pet. granted).

The court reviewed the probable cause requirements for warrant affidavits. There must be probable cause to believe three things: 1) an offense occurred, 2) the items to be seized are evidence of the offense, and 3) the items will be at the searched location. *Id.* at. 234. After discussing cases that dealt with the second requirement, the

Fourteenth Court held that the affidavit did not meet the third requirement. *Id.* at 234-39.

The court rejected the State's argument that the presence of surveillance cameras in most businesses was a matter of common knowledge, because the court believed that for a matter to be "common knowledge" it must be "beyond dispute," and "[t]he presence of surveillance video or equipment in an auto shop is not so well known to the community as to be beyond dispute." *Id.* at 239. The court also rejected the State's argument that there was specific reason to believe auto body shops were particularly likely to have surveillance cameras because, the court held, it was not well-known that body shops keep customers' cars until the customers pay. *Id.* at 239-40.

The court turned to the State's plain-view argument. The court stated that there are three requirements for a plain-view seizure: 1) police must lawfully be where they can view the item; 2) the "incriminating character" of the object must be "immediately apparent"; and 3) "the officials must have the right to access the object." *Id.* at 241. The court said that only the second requirement was at issue.

The State had cited *Arrick v. State*, 107 S.W.3d 710 (Tex. App.—Austin 2003, pet. ref'd). There, police were serving a search warrant for a murder suspect's clothing when they observed the suspect's boots. Police seized the boots, and, although there was no visible blood on the boots, lab tests found the victim's blood. The Third Court held that seizing the boots was a lawful plain-view seizure because "their value as evidence was immediately apparent." *Arrick*, 107 S.W.3d at 719.

The Fourteenth Court distinguished *Arrick* because "it involved reasonable inferences applied to clothing." *Foreman*, 561 S.W.3d at 242. Perhaps suspecting this was not a satisfactory distinction, the court dropped a footnote saying that *Arrick* was not binding because it was from a different court. *Id.* at 242 n.14.

The court concluded that the seizure was unlawful because there were not sufficient facts "to warrant a person of reasonable prudence to believe the computer hard drive contained evidence." *Id.* 242. The court believed it did not become apparent until the hard drive was analyzed. The court then made an uncited assertion that officers' seizure of the two other hard drives "undermines a probable cause determination." *Id.* at 242-43.

The court quoted Hufstedler's testimony that when officers saw the hard drive connected to a surveillance system recording the crime scene, they "determined that there might be a possibility that video had been taken." *Id.* at 243. The court interpreted this to mean none of the officers "believed the hard drive … would contain video surveillance from the time of the offenses…." *Ibid.*

The court compared the case to *Nicholas v. State*, 502 S.W.2d 169 (Tex. Crim. App. 1973). Police arrested Nicholas on an out-of-state parole warrant and had no reason to suspect him of any crime. *Nicholas*, 502 S.W.2d at 172. During the arrest, officers saw some photo negatives in Nicholas's kitchen; officers held the negatives up to the light and saw they were pictures of Nicholas having sex with an 11-year-old. *Id.* at 170-71. This Court held that was not a lawful plain-view seizure because the incriminating nature of the negatives was not apparent until officers conducted an additional search. *Id.* at 172. The Fourteenth Court held this case was like *Nicholas* because the "incriminating character" of the hard drive was not apparent until police later searched it. *Foreman*, 561 S.W.3d at 244.

In a one-paragraph harm analysis, the Fourteenth Court determined that reversal was warranted under the standard for non-

constitutional harm because, other than the video, the testimony of the complainants was the only "strong evidence showing appellant's involvement." *Id.* at 245.

In a dissent, Justice Jamison argued the warrant was valid because a magistrate could have inferred that there were surveillance cameras on the premises. *Id.* at 245-48 (Jamison, J., dissenting). This was so because surveillance cameras are "ubiquitous" inside businesses, and magistrates can rely on matters of common knowledge in finding probable cause. *Id.* at 245-46. Moreover, auto body shops store valuable items and "it is a reasonable inference that the auto shop would take measures necessary to protect its business from theft or vandalism." *Id.* at 248.

Justice Donovan dissented because he believed the appellant had failed to prove standing, and because he believed any error was harmless beyond a reasonable doubt because the surveillance video was cumulative of other, well-corroborated evidence. *Id.* at 248-253 (Donovan, J., dissenting).

## Ground 1

**The Fourteenth Court erred by holding that a magistrate could not infer from the warrant affidavit that an auto body shop would have a surveillance system. The Fourteenth Court held that before a magistrate could consider common knowledge, the matter must be "beyond dispute," a civil standard the Fourteenth Court grafted onto Fourth Amendment law.**

There are three aspects of probable cause for a search warrant: 1) Probable cause to believe an offense was committed; 2) probable cause to believe the item to be seized constitutes evidence of that offense; and 3) probable cause to believe the item to be seized will be at the searched location. The Fourteenth Court found the affidavit insufficient only as to the third aspect; neither the appellant nor the Fourteenth Court cited to any other case holding a warrant insufficient on this basis, and the State is unaware of any.

The Fourteenth Court's basic observation—the affidavit did not explicitly state there were surveillance cameras at Dreams Auto Customs—is true, as far as it goes. The affidavit is also silent on whether anyone involved in the office had hair, left fingerprints, or shed skin cells on the premises, yet the warrant authorized the seizure of "all DNA and items that may contain biological material; fingerprints; [and] hair fibers."

Warrants may authorize seizure of items not explicitly mentioned in an affidavit so long as the presence of the item to be seized can be inferred from other facts in the affidavit, or from common knowledge. *See Flores v. State*, 319 S.W.3d 697, 703 (Tex. Crim. App. 2010) (describing indirect inferences that magistrate could draw from facts stated directly in affidavit). For instance, in *Eubanks v. State*, 326 S.W.3d 231 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd), the warrant affidavit said the complainants said their grandfather took inappropriate pictures of them. Although the affidavit did not say the pictures were digital, or that there was any computer equipment in the grandfather's home, the warrant authorized seizure of "all computer related equipment." *Eubanks*, 326 S.W.3d at 247-48. On appeal, the First Court held it was reasonable for the magistrate to infer there would be computer equipment at the house. *Id.* at 248-49. Although it did not state as much, that's likely because it's obvious there is a fair probability to believe any recently taken picture is stored electronically.

The Fourteenth Court discussed *Eubanks* in a footnote, apparently disagreeing with its holding on this point. *Foreman*, 561 S.W.3d at 238 n.10 ("We have not followed *Eubanks* for that proposition."). The Fourteenth Court distinguished *Eubanks* by

pointing out that the affidavit here did not say anyone was videotaped. *Ibid*. But that distinction misses the point: *Eubanks* took the existence of a camera and inferred the existence of a computer to store pictures. Why is that more reasonable than taking the existence of a business that stores valuable, moveable objects and inferring the existence of a surveillance system to protect those objects?

The reason, according to the Fourteenth Court, is that before a matter can be "common knowledge," it must be "beyond dispute." *Id*. at 239. The Fourteenth Court got this definition from *Cardona v. State*, 134 S.W.3d 854, 859 (Tex. App.—Amarillo 2004, pet. ref'd), which in turn got it from *Ritz Car Wash Inc. v. Kastis*, 976 S.W.2d 812 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). *Ritz Car Wash* used the term to describe when a manufacturer must put a warning label on a product to avoid tort liability.

"Beyond dispute" is a standard unknown to the criminal law of this state,[6] and the Fourteenth Court erred in applying it to a magistrate's probable cause determination. Reviewing courts must

[6] *Cardona* dealt with whether the ingredients for methamphetamine were "common knowledge." The Seventh Court held they were not, which is surely correct. That does not mean its adoption of the "beyond dispute" standard was correct. As best the State can tell, *Cardona* and *Foreman* are the only Texas criminal cases to use this standard.

afford a magistrate's probable cause determination "all reasonable and commonsense inferences and conclusions that the affidavit facts support." *Rodriguez v. State*, 232 S.W.3d 55, 64 (Tex. Crim. App. 2007).

Magistrates making probable cause determinations, like jurors assessing evidence, may rely on common knowledge and experience. For instance, in *Davis v. State*, 202 S.W.3d 149 (Tex. Crim. App. 2006), the affiant described himself merely as an "Officer … on patrol in Noncona" who smelled methamphetamine at a suspected location. *Davis*, 202 S.W.3d at 156. From that, this Court held the magistrate could have inferred the affiant 1) was a local police officer, and 2) had sufficient training and experience to recognize the smell of methamphetamine.

These are reasonable inferences that meet the "fair probability" standard of probable cause. Is it "beyond dispute" that everyone who calls himself "officer" can recognize the smell of methamphetamine? Of course not. But warrant affidavits need not establish facts "beyond dispute"; probable cause is sufficient

Here the affidavit established that the crime scene was an auto body shop with tinted windows and doors that closed. A magistrate

could have inferred that Dreams Auto Customs, like most body shops, contained valuable, movable items and, like most businesses—particularly those with valuable, movable items—probably had a surveillance system. As Justice Jamison noted, surveillance cameras are "ubiquitous" in businesses.

"Probable cause" is not a particularly high burden to clear. The question is not whether the affidavit *proves* that the item will be at the suspected location, but whether it shows there is a substantial chance that the item is at the location: "Probable cause for a search warrant does not require that, more likely than not, the item or items in question will be found at the specified location." *Flores*, 319 S.W.3d at 702. Thus in *Eubanks*, the question on appeal was not whether the affidavit *proved* that the pictures were taken on a digital camera. Rather, the question was: Given the common knowledge of everyday life, did the bare knowledge that someone was taking pictures support an inference that there is a substantial chance that person used a digital camera and stored those photos on a computer? The First Court correctly held it did. *See also Ellis v. State,* 677 S.W.2d 129, 133 (Tex. App.—Dallas 1984, pet. ref'd) ("magistrate [who issued search warrant to search gambling place], as a matter of common knowledge,

knew that professional football games were to be played during the weekend of December 12 and 13, 1981").

The magistrate who issued the warrant as well as three trial judges have believed there was a substantial chance that an auto body shop would have a surveillance setup.[7] When the affiant testified at trial, he said that it was "probably expected" that a business like the appellant's would have a surveillance system. (3 RR 204-05). The Fourteenth Court erred by imposing the excessively high "beyond dispute" standard, and this Court should reverse that decision.

## Ground 2

**The Fourteenth Court erred by holding that when officers see a surveillance system recording a location where a crime occurred two weeks prior, they do not have probable cause to seize the system's hard drive unless they know what is on the hard drive prior to examining it.**

Even if the warrant were invalid for the surveillance system, on abuse-of-discretion review the appellant's complaint should have still been rejected because the seizure of the hard drive was a lawful plain-view seizure. A seizure is lawful if 1) police are lawfully in a place where they can observe the object; 2) it is "immediately apparent" the

[7] One judge who presided over this case commented that "we all have [surveillance systems] in our houses …." (MTS RR 16).

object is or contains evidence; and 3) police have the right to access the object. *State v. Dobbs*, 323 S.W.3d 184, 187 (Tex. Crim. App. 2010). All that is meant by "immediately apparent" is that police have probable cause without conducting a search. *Ibid.*

The evidence of probable cause here was straightforward. Police, while lawfully on the premises, observed a video monitor with a cable leading from it to "a tower or a computer hard drive." (MTS RR 15). The monitor was showing live surveillance video of the shop where police believed the offense had occurred two weeks earlier, so they seized the hard drive in the belief that it might have archived video relevant to the investigation. (MTS RR 15-16).

The Fourteenth Court held this was not probable cause to believe there would be evidence of an offense on the hard drive. Part of this conclusion comes from its reading of the record, where officers hedged their conclusions by noting that they "assumed" the hard drive "might" contain evidence of the offense. *Foreman*, 561 S.W.3d at 243. But obviously officers did not *know* what was on the hard drive before seizing it; they had to make inferences, which is what probable cause is about. *See Joseph v. State*, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991) (plain-view seizure requires only probable cause; "The

immediately apparent prong of the plain view analysis does not require actual knowledge of incriminating evidence.").

The State relied on *Arrick v. State*, 107 S.W.3d 710 (Tex. App.—Austin 2003, pet. ref'd), where the Third Court upheld the plain-view seizure of the murder suspect's boots because the boots' evidentiary value was obvious. The Fourteenth Court distinguished *Arrick* because "it involved reasonable inferences applied to clothing. It is common knowledge that shoes are worn like other clothing." *Foreman*, 561 S.W.3d at 242. The Fourteenth Court did not explain why it is less reasonable to infer there is surveillance footage on a surveillance system hard drive than it is to infer that there is unseen blood on boots. At any rate, the Fourteenth Court dropped a footnote saying it was not bound by *Arrick*. *Id.* at 242 n.15.

The Fourteenth Court instead said this case was "akin to" *Nicholas v. State*, 502 S.W.2d 169 (Tex. Crim. App. 1973), but in *Nicholas* there was no suspected offense before seizing and viewing the picture negatives, thus it could not have been immediately apparent whether the negatives were evidence. Here, police had probable cause to believe an offense had been committed at this location, thus they

had reason to believe the surveillance system actively surveilling the scene might contain evidence.

Probable cause is probable cause is probable cause; the standard is the same whether it's justifying an arrest, a warrant, or a plain-view seizure. Without conducting a further search, or obtaining the video voluntarily, police will never have more information about the content of a surveillance system than what they had here. When viewed in context, the Fourteenth Court's plain-view-seizure holding is shocking: The totality of police knowledge here did not justify seizing the hard drive from a surveillance system that was actively recording a crime scene. That is: The video of the offense was *unseizable*. Under the standard the Fourteenth Court applied here, it is effectively impossible for police to seize surveillance equipment, either by warrant or plain-view seizure, unless the owner voluntarily shares the contents.

Probable cause is a flexible standard, requiring a showing only that there is "a fair probability or substantial chance." *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). Is there a substantial chance that a functioning surveillance system aimed at a recent crime scene contains evidence of the crime? The State believes the answer is "yes," and the Fourteenth Court erred in holding otherwise.

## Ground 3

**The Fourteenth Court erred by holding that the error required reversal, even under the standard for non-constitutional error, where the State's remaining evidence was overwhelming and the defense non-existent.**

The State presented a novel argument that any error here was non-constitutional. [8] The Fourteenth Court assumed, without deciding, this was correct, but in a one-paragraph harm analysis determined that reversal was warranted. *Foreman*, 561 S.W.3d at 245.

As Justice Donovan pointed out, though, even without the video the State's evidence was overwhelming. By the end of the case, the appellant had no defense.

### I. The State's case was very strong, and the complainants' testimony well-corroborated.

The complainants' testimony was corroborated in several ways independent of the video. First, they both rolled out of a moving van —still bound—while people in the van shot them; multiple

[8] In short: If the warrant failed to state probable cause, the evidence was *obtained* in violation of the Fourth Amendment. But because there was a facially-valid warrant, this would qualify for the federal good-faith exception, meaning the evidence was not *admitted* in violation of the Fourth Amendment. But because this situation would not qualify for the state good-faith exception, and the evidence was obtained in violation of the Fourth Amendment, the admission of the evidence violated Article 38.23, which is non-constitutional error. (State's Post-Submission Brief at 2-11).

uninterested witnesses testified to them rolling out of the van, and the State introduced medical records documenting the complainants' injuries. (*See* 3 RR 49-56; 106-12, 116-20; State's Ex. 9).

Second, police found significant evidence at the scene of the crime, other than the video, that corroborated the complainants' stories: black zip ties used to bind the complainants (4 RR 89, 91, 164); tape used to bind the complainants (4 RR 71, 164; 5 RR 145); the gas can used to douse Glekiah (4 RR 4; 5 RR 152); and the clothes iron used to burn Merchant (4 RR 35, 171; State's Ex. 112). In particular, the clothes iron seems incriminating, as it was found seemingly out of place on a shelf between an alternator and a distributor, but near the zip ties. (4 RR 91-92; State's Ex. 72).

Third, evidence found in a burned-out car corroborated their story. Merchant testified that he was staying in Houston with a friend named Roland Tuolee, and Tuolee rented the car Merchant and Glekiah took to the appellant's shop. (4 RR 92, 135, 187; State's Ex. ). The day after the kidnapping and robbery, police found a burned-out rental car registered to Tuolee. (4 RR 78, 108-10). Inside the car, police found a backpack and bags full of fake money, packaged like Merchant and Glekiah described bringing with them to the appellant's

auto shop. (4 RR 116-19, 124-27; State's Exs. 75-83, 85; 5 RR 76-78). The complainants' driver licenses were found inside the car. (4 RR 119; State's Ex. 84).

The connections between the complainants' story and the appellant were not coincidence or the result of a complicated investigation: Glekiah led police to the appellant's shop as soon as he was physically able. (3 RR 157-59). The appellant's shop is within a quarter mile of where the complainants rolled out of the van. (3 RR 158). The shop was apparently owned by the appellant's wife. (State's Exs. 12, 13). Glekiah picked the appellant out of a photo lineup. (5 RR 178-80). For Glekiah to pick out the location of the offense and to then pick from a photo lineup a person associated with that location is corroboration for the complainants' story.

The Fourteenth Court poo-pooed the complainants' credibility, describing them as "admitted con artists" and implying their testimony was not credible. But as defense counsel pointed out in closing argument, the video does not show sufficient evidence to convict. The jury plainly found the complainants credible and the Fourteenth Court erred in disregarding their testimony in its harm analysis.

## II. The appellant had no defense. The closest defense counsel came to a defense was suggesting that perhaps the appellant robbed and kidnapped the complainants in self-defense.

The Fourteenth Court did not discuss the appellant's defense, possibly because he had none. But failing to discuss the nature of the defense seems like a critical error in a harm analysis.

Reviewing the defense's closing arguments, only two themes appear: First, defense counsel kept emphasizing, correctly, that the videos were not themselves incriminating, and that to convict the appellant of the charged offenses the jury had to believe the complainants. Second, despite the lack of a self-defense instruction, defense counsel kept claiming that perhaps whatever force was used against the complainants was self-defense or something like it. Scattered among these themes are a variety of assertions that, in hindsight, shows how weak the defense was.

- The self-defense assertions began at the beginning of the jury argument: "Who wouldn't defend themselves if they were being robbed?" (6 RR 7-8). Defense counsel pointed out that the appellant was "a family man," and the complainants were admitted con artists. (6 RR 8).

- Defense counsel pointed out that the video was a "silent movie," and to convict the appellant the jury had to believe the complainants about what happened off camera. (6 RR 8-9).

- Defense counsel suggested that the jury should acquit the appellant if it did not understand the intricacies of the black money. (6 RR 9). Defense counsel argued that the black money scheme was evidence that the complainants were armed when they showed up at the shop.[9] (6 RR 9-10).

- The closest the defense came to an actual defense was to point out that a co-defendant, Charles Campbell, had the same nickname as the appellant, and perhaps he was the "Pops" who was giving the orders to torture the complainants.[10] (6 RR 12; *see* 4 RR 87).

- Defense counsel reviewed part of Glekiah's testimony about his background and asked, rhetorically, "Do you believe that?" (6 RR 13). Defense counsel pointed out that when Glekiah spoke with the police he referred to Merchant using an alias. (6 RR 13). Defense counsel attacked Glekiah's testimony for including details that Glekiah did not give in prior police statements, particularly that there was cash in his wallet when the appellant's gang stole it. (6 RR 13).

- Defense counsel argued that Merchant and Glekiah were not credible because they had convictions for domestic violence and pimping, respectively. (6 RR 14). Defense counsel argued that because the complainants' statements were inaccurate on a couple of points, but in ways that were similar to each other's statements (they said the van was green but witnesses said it was white;[11] they vacillated

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[9] There was no evidence the complainants were armed.

[10] Campbell admitted to being the driver of the van. (4 RR 24-26). The appellant and Campbell look nothing alike. (*Compare* Def.'s Ex. 11 and 13).

[11] According to defense counsel, this meant that "maybe they didn't want … anyone to find the drivers." (6 RR 16).

on whether there were six or seven assailants), this was a sign that they had coordinated their testimony. (6 RR 15).

- Defense counsel correctly pointed out that nothing on the video showed the appellant giving orders to the other assailants, so the video provided no basis to convict him as a party. (6 RR 16).

- Defense counsel claimed that the reason the appellant was charged with kidnapping and robbery of only Glekiah is that the State knew Merchant's testimony was not credible. (6 RR 17). That said, defense counsel suggested that if the jury wanted to believe Merchant that somoene named "Pops" was giving orders, perhaps it should believe it was Charles Campbell, not the appellant, who was in charge. (6 RR 17).

- Defense counsel pointed out that the appellant was not present when the complainants were shot during their escape from the van, so the appellant "clearly" had nothing to do with that aggravated assault. (6 RR 17-18).

- Defense counsel claimed the evidence of the burned car was irrelevant, and was admitted to "inflame [the jury] and incite [the jury] to find someone guilty because that looks suspicious." (6 RR 18). Defense counsel found it "interesting" that all the supplies for the black money scam were in the car because it meant maybe someone burned the car to hide evidence of the scam.[12] (6 RR 19).

- Defense counsel moved on to note a lack of fingerprint and DNA evidence in the case. (6 RR 19-20). Defense counsel followed this up by suggesting that the police got "scammed" by the complainants. (6 RR 20). Defense counsel pointed out that the complainants admitted on the stand to trying to steal $100,000 from the appellant. (6 RR

[12] Defense counsel did not explain why Glekiah and Merchant would have left their licenses in the car if they were the ones who burned it.

21). Defense counsel argued that because Glekiah testified he was not worried about being prosecuted for this crime, the complainants were "saying what the State wants them to say."[13] (6 RR 21).

- Defense counsel made "another commonsense statement: Who would bite the hand that feeds them?" (6 RR 21). By this, defense counsel was asking why the appellant would hurt the complainants when the complainants were offering to make so much money for the appellant. (6 RR 21-22).

- Defense counsel used "[a]nother commonsense argument" to assert that, because the complainants made so many preparations for their scam, surely that means they must have brought guns with them. (6 RR 22).

- Defense counsel pointed out that it was unclear on the video whether the appellant had a gun. (6 RR 22-23).

- Defense counsel argued that because the appellant already had money, "[h]e [didn't] need to rob them." (6 RR 23). The complainants had the "bad motive." (6 RR 23). This showed that the complainants were testifying for the State to avoid prosecution. (6 RR 23). "These," defense counsel said, "are all commonsense conclusions." (6 RR 23).

- Defense counsel discussed the jury charge for the robbery case. (6 RR 24). Defense counsel argued that the State had not proved any property was stolen. (6 RR 24). The rental car belonged to Roland Tuolee, so that didn't count.[14] (6 RR 24). Defense counsel claimed that accusations the gang stole the complainants' cash did not make sense because

[13] Defense counsel did not suggest any motive for the State to fabricate a case against the appellant.

[14] Defense counsel said the complainants did not have a property interest in the car because they had probably gotten it from Tuolee through a scam. (6 RR 24-25).

the appellant "had all the money." (6 RR 25). Finally, defense counsel argued the jury could not base a robbery conviction on the stolen driver licenses because the State had not proven that the licenses had value. (6 RR 26). Defense counsel admitted this was "a trick interpretation" of the jury charge, but urged the jury to acquit on this basis. (6 RR 26).

- Defense counsel returned to the video, again pointing out that the video was not evidence of guilt unless the jury believed the complainants. (6 RR 26-27). "If there's a lot of possibilities of things that could have reasonably happened off camera, you might be saying perhaps or possibly not or suspect it; but you're still not at the level of beyond a reasonable doubt." (6 RR 27). Defense counsel theorized that perhaps the complainants brought weapons to the deal, and then panicked, and then "[v]iolence ensued." (6 RR 28). Defense counsel claimed that, after the violence, perhaps the appellant and his gang loaded the complainants in the van to take the complainants away from the scene to prevent police from coming there. (6 RR 29). According to defense counsel, "That's not a crime." (6 RR 29).

The record is not precise on how long the jury deliberated, but it was not long. After the parties rested, the trial court told the jury court would start at 10 the next morning. (5 RR 251). The Court's charges, which are often time stamped after being read, were time stamped at 10:25 am. (1 CR 241; 2 CR 255). The trial court said the parties would have 45 minutes each for jury argument. (5 RR 254). The defense argument takes up 26 pages in the record; the prosecutor describes it as lasting 30-45 minutes. (6 RR 33). The State's argument

takes up 22 pages. The verdicts are time stamped by the clerk at 12:37pm. (1 CR 242; 2 CR 256). Thus after two-and-a-half days of testimony and being charged on two offenses, the jury deliberated for not much more than an hour.

The Fourteenth Court's final error was when its harm analysis, in reversing the conviction, took into account that the trial court considered the video for punishment. The effect of improperly admitted evidence on the trial court's punishment verdict is tangential to whether that evidence had a substantial effect on the jury's guilt verdict. The guilt-phase verdict is binary, but the punishment verdict is a gradient; evidence that effects punishment may have had no effect on the guilt decision.

To warrant reversal, non-constitutional error must have affected the jury's verdict. Here, the remaining evidence of guilt was overwhelming and not seriously controverted. The Fourteenth Court erred in concluding that any error in admitting the video required reversal under the non-constitutional harm standard.

## Conclusion

The State asks this Court to reverse Fourteenth Court's judgment, correct the legal errors that court made that harm the state's jurisprudence, and reinstate the appellant's conviction.

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Date: March 28, 2019